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ATTORNEY FOR APPELLANT:

LORINDA MEIER YOUNGCOURT
Huron, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

MONIKA PREKOPA TALBOT
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

JAKE CARROLL,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 14A04-0606-CR-328

APPEAL FROM THE DAVIESS CIRCUIT COURT
The Honorable Robert L. Arthur, Judge
Cause No. 14C01-0505-MR-21

March 27, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Jake Carroll (Carroll), appeals his sentence for murder, a felony, Ind. Code § 35-42-1-1.

We reverse and remand.

ISSUE

Carroll raises one issue on appeal, which we restate as: Whether the trial court appropriately sentenced Carroll.

FACTS AND PROCEDURAL HISTORY

Carroll was born on October 16, 1984. He began drinking alcohol at the age of twelve or thirteen, and would drink to the point of passing out or vomiting. In September 2002, when Carroll was a junior in high school, he drove a car into a ditch and admitted to operating a vehicle while intoxicated. He was placed on probation and later admitted to violating that probation by using drugs. As a result of his violation, he spent seven days in a juvenile facility.

When Carroll was a senior in high school he began dating J.M., who was a freshman. The two spent many nights together at Carroll's house. J.M. became pregnant. While Carroll was ecstatic, J.M. was apprehensive and scared. Carroll and J.M. got engaged and had a "blood marriage" ceremony where they actually cut one another's hands, put them together, and said vows. (Transcript p. 151). Carroll also bought a house on contract from his aunt and uncle so his new family would have a home. He worked on the house in the evenings after putting in a full day's work.

On September 28, 2004, Z.C. was born to nineteen-year-old Carroll and sixteen-year-old J.M. Carroll took a very active role in caring for Z.C. Although Z.C. lived with J.M.'s grandmother, Carroll would visit and play with Z.C. every day after work for several hours. However, after Z.C.'s birth, J.M. began to distance herself from Carroll. When they fought, J.M. would threaten to take Z.C. away from Carroll. There were times when Carroll could not find J.M. Carroll would call family and friends looking for J.M. In the spring of 2005, J.M. began seeing Timothy Pruett (Pruett). Carroll and Pruett were high school friends. Carroll and J.M.'s fights became more frequent. Carroll constantly threatened to kill himself, one time going so far as to put a loaded shotgun in his mouth.

On Friday, May 27, 2005, J.M. told Carroll over the phone she was breaking up with him. Upon hearing this, Carroll threw his cell phone, sat on his truck, and "cried like a baby." (Tr. p. 147). The rest of the evening, Carroll unsuccessfully tried to reach J.M. twenty-two times by phone. A friend of Carroll's joined him at his mother's house and the two began drinking. Although J.M. had told Carroll she was breaking up with him, she too showed up later that evening.

The next day, J.M. was telling Pruett she was not sure who to choose – Carroll or him. Throughout the day she said she was going back to Carroll, but then said she wanted to be with Pruett. On Sunday, May 29, J.M. told Carroll she heard his mother had papers to take Z.C. away from J.M. and that she would no longer leave Z.C. with Carroll's mother. Carroll's mother denied the allegations, and not knowing whom to believe, Carroll and J.M. took Z.C. to J.M.'s grandmother. Carroll and J.M. spent the

night together at J.M.'s mother's house. Monday morning they fought. Carroll left, but then tried to get back in touch with J.M. for the next four hours. In the meantime, J.M. met up with Pruett.

Later that afternoon, J.M. and Pruett were in his backyard playing basketball when they saw Carroll drive by the house. Carroll drove by the house four or five times before parking. As Carroll approached the front door, J.M. went outside and told him to leave. Carroll yelled for Pruett to come outside. Pruett told Carroll to leave or he would call the police. Carroll retreated to his vehicle and returned to the front door carrying a shotgun. J.M. fled from the doorway, and Carroll shot Pruett with a twelve-gauge pump-action shot gun. Carroll fired six rounds, hitting Pruett with four sabot deer slugs, causing twenty-three separate entry and exit wounds. Pruett died from his injuries.

Carroll was apprehended by Pruett's step-father and neighbors and held until the police arrived. All the while he was yelling that "they should let him go as he wasn't going to hurt anyone, he just wanted to kill himself as his life is over." (Exhibit S). On the way to the police station Carroll tried to strangle himself with his seatbelt. He told the deputies in the car that he'd been drinking heavily and had pointed the gun at himself but could not pull the trigger. He also asked if there was a God, why did He let him shoot Pruett.

Many empty alcohol containers were found at Carroll's parents' house that did not belong to his parents. There were also suicide notes on the coffee table addressed to J.M. and Z.C. Carroll had also left several voicemails on J.M.'s mother's phone attempting to reach J.M. concluding with "goodbye cruel world." (Tr. p. 50).

On May 31, 2005, the State filed an Information charging Carroll with Count I, murder, a felony, I.C. § 35-42-1-1(1). On February 15, 2006, Carroll pled guilty to murder, agreeing to “any sentence authorized by law.” (Appellant’s App. p. 47). After a sentencing hearing on May 3, 2006, the trial court sentenced Carroll to the maximum sixty-five years, executed with no time suspended. The trial court found Carroll’s guilty plea, minor criminal history, and age as mitigating factors, but afforded them all little weight. Premeditation, lack of remorse, a juvenile probation violation, committing the crime in the presence of a minor, and the nature and circumstances of the crime were found by the trial court as aggravating factors.

Carroll now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Carroll argues the sixty-five year sentence imposed by the trial court is inappropriate. Specifically, Carroll claims the sentence is inappropriate in light of his age, his one prior juvenile adjudication, his history of depression and alcoholism, his remorse, and his guilty plea. We agree.

Carroll was sentenced under Indiana’s new advisory sentencing scheme, which went into effect on April 25, 2005. Under this scheme, “Indiana’s appellate courts can no longer *reverse* a sentence because the trial court abused its discretion by improperly finding and weighing aggravating and mitigating circumstances[;]” appellate review of sentences in Indiana is now limited to Appellate Rule 7(B). *McMahon v. State*, 856 N.E.2d 743, 748-49 (Ind. Ct. App. 2006) (emphasis added). Thus, the burden is on the defendant to persuade this court that his or her sentence is inappropriate. *Id.* at 749.

Nonetheless, an assessment of aggravating and mitigating circumstances is still relevant to our review for appropriateness under the rule, which states: “The [c]ourt may revise a sentence authorized by statute if, after due consideration of the trial court’s decision, the [c]ourt finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender.” *Id.* at 748-49. We will therefore consider the aggravating and mitigating circumstances identified by the trial court in addressing Carroll’s argument that his sentence is inappropriate.

Carroll first asserts the trial court failed to assign sufficient weight to his young age as a mitigating circumstance. Carroll cites two murder cases where our supreme court held that the defendants’ young age was deserving of considerable mitigating weight. *Brown v. State*, 720 N.E.2d 1157, 1159 (Ind. 1999) (a defendant’s young age is to be given considerable weight as a mitigating circumstance in some cases); *Walton v. State*, 650 N.E.2d 1134 (sentence for murder reduced based in part on defendant’s age). Likewise, Carroll claims his young age and immaturity “left him incapable of dealing with J.M.’s indecisiveness over their relationship and her threats to take away their son.” (App. Br. p. 17).

Carroll also challenges the trial court finding his probation violation for his one prior juvenile adjudication as an aggravating circumstance. Carroll focuses on the fact that “a single, nonviolent misdemeanor is not a significant aggravator in the context of a sentence for murder.” *See Wooley v. State*, 716 N.E.2d 919, 929 (Ind. 1999), *reh’g denied*. He further argues that Indiana courts have attached greater aggravating weight to recent violations of probation when sentencing a defendant for a crime committed while

still on probation. *Ketcham v. State*, 780 N.E.2d 1171, 1182 (Ind. Ct. App. 2003), *trans. denied*. Carroll's probation was terminated in 2003, and he was not on probation at the time of the instant offense. Thus, the trial court should assign little aggravating significance to his juvenile probation violation.

Carroll next argues the trial court failed to recognize his history of depression and alcoholism as a mitigating factor. When the trial court fails to find "a mitigator that the record clearly supports, a reasonable belief arises that the mitigator was improperly overlooked." *Williams v. State*, 840 N.E.2d 433, 438 (Ind. Ct. App. 2006), *aff'd on reh'g*, April 11, 2006. Recently, however, in *Covington v. State*, 842 N.E.2d 345, 349 (Ind. 2006), our supreme court discussed mental illness as a mitigator and the need for a high level of discernment when assessing a claim that mental illness warrants mitigating weight. The supreme court has laid out several factors to consider in weighing the mitigating force of a mental health issue. Those factors include the extent of the inability to control behavior, the overall limit on function, the duration of the illness, and the nexus between the illness and the crime. *Id.* Here, we determine Carroll has not satisfied his burden of showing that the mitigating evidence is both significant and clearly supported by the record. Aside from the pre-sentence investigation report produced for the sentencing hearing, Carroll's own testimony, and testimony of his friends and family that he suffers from depression, there is nothing in the record to indicate Carroll was incapable of controlling his behavior, had significant limitations on his functioning, or that any nexus between his mental illness and the instant offense

exists.¹ Thus, we cannot conclude that the trial court erred by overlooking mental illness as a mitigating factor in sentencing Carroll.

With respect to remorse, Carroll argues the record does not support the trial court finding remorse as an aggravating circumstance. The trial court stated, “[t]he only remorse that the [c]ourt has noted or seen was at the end of the sentencing hearing.” (Tr. p. 211). A trial court’s determination of a defendant’s remorse is similar to a determination of credibility. *Pickens v. State*, 767 N.E.2d 530, 535 (Ind. 2002). Absent evidence of some impermissible consideration by the trial court, we accept its determination of credibility. *Id.* A defendant lacks remorse when he displays disdain or recalcitrance, the equivalent of “I don’t care.” *Bluck v. State*, 716 N.E.2d 507, 513 (Ind. Ct. App. 1999). This has been distinguished from the right to maintain one’s innocence, *i.e.*, “I didn’t do it.” *Id.* Our supreme court has stated that a lack of remorse by a defendant who insists upon his innocence may be regarded as an aggravator. *Bacher v. State*, 686 N.E.2d 791, 801 (Ind. 1997). An exception has been found where a defendant maintained his innocence and the only evidence of guilt was the victim’s uncorroborated testimony. *See Bluck*, 716 N.E.2d at 513.

As evidenced by his guilty plea, Carroll did not insist upon his innocence. Carroll also did not display disdain or recalcitrance for his actions. Rather, he wrote a heartfelt letter to the family of his victim, and had several persons testify on behalf of his remorse.

¹ Furthermore, we cannot determine, based on our review of the record, when Carroll began taking medication for depression and sleep.

Thus, we conclude Carroll's remorse should not have been considered an aggravating factor.

Lastly, Carroll claims his guilty plea should have been entitled to significant mitigating weight. In support of that proposition, Carroll relies on *Williams v. State*, 430 N.E.2d 759, 764 (Ind. 1982), *reh'g denied*, which states, "a defendant who willingly enters a plea of guilty has extended a substantial benefit to the [S]tate and deserves to have a substantial benefit extended in return." This is not to say the substantial benefit to the defendant must be at sentencing. There are situations when a defendant greatly benefits from a guilty plea, and as a result may not be so deserving of a benefit at sentencing. If, for example, the benefit is in exchange for pleading guilty a benefit must not also necessarily be extended at sentencing. *See Sensback v. State*, 720 N.E.2d 1160, 1165 n.4 (Ind. 1999) (defendant's benefit was received when the State amended the charge from a Class A felony carrying twenty to fifty years to a Class B felony carrying six to twenty years).

Here, Carroll pled guilty to the exact charges against him with the sentence open to "any sentence authorized by law." (Appellant's App. p. 47). While he did not plead guilty immediately after charges were filed, he did not wait until the proverbial eleventh hour either. Carroll pled guilty more than one month before the trial date saving the county the expense of a jury trial. Additionally, the victim's family was spared from having to endure a trial. Instead, they were able to hear Carroll accept responsibility for his actions. Therefore, Carroll should have been afforded mitigating weight for his guilty plea at sentencing, as he received no benefit for his guilty plea prior to sentencing.

In reviewing the factual basis and Carroll's statements, we find there was some support for the premeditation aggravator found by the trial court. Specifically, there is evidence Carroll (1) was circling the block where Pruett lived, (2) was armed with multiple weapons, and (3) had previously threatened Pruett. While we will not speculate as to why Carroll was in fact circling Pruett's block, we find no evidence beyond a reasonable doubt in the record to support premeditation as an aggravating factor.

The trial court also found the nature and circumstances of this crime as an aggravating factor. The trial court noted "[Pruett] was unarmed, in his mother's home, trying to escape and call 911," when he was shot multiple times at close range. (Appellant's App. p. 28). We cannot disagree this warrants weight as an aggravating circumstance. We also cannot dispute the trial court's finding that this offense was committed in the presence of a minor as an aggravating factor since J.M., a minor, was present.

However, considering Carroll's character as shown by his limited criminal history, age, and remorse, and considering the nature of the crime which was committed in the presence of a minor by firing multiple shots at close range at the victim in his mother's home, we deem the sentence inappropriate. Thus, we conclude the advisory sentence for murder, fifty-five years, to be an appropriate sentence.

CONCLUSION

Based on the foregoing, we find Carroll's sixty-five year sentence inappropriate.

Reversed and remanded with instructions to amend Carroll's sentence consistent with this decision.

KIRSCH, J., concurs.

FRIEDLANDER, J., dissents with separate opinion.

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Appellant-Defendant,)	
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vs.)	No. 14A04-0606-CR-328
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

FRIEDLANDER, Judge, dissenting

I believe the sixty-five-year sentence imposed by the trial court was not inappropriate, and therefore respectfully dissent from the majority’s decision to vacate that sentence and impose a lesser one.

As the majority indicates, under the new sentencing scheme, our review of sentencing is limited to grounds enunciated in Ind. Appellate Rule 7(B), which permits a revision of the sentence imposed by the trial court if we find the original sentence, “is inappropriate in light of the nature of the offense and the character of the offender.” *McMahon v. State*, 856 N.E.2d 743 (Ind. Ct. App. 2006). Pursuant to this mandate, the majority undertakes a review of the aggravators and mitigators found by the trial court, including both a determination as to whether each particular factor was properly found in the first place, and then a determination of the appropriate weight to be given those properly found.

The trial court found three mitigators: (1) the guilty plea, (2) Carroll's minor criminal history, and (3) Carroll's age. The trial court accorded these mitigators – individually and in the aggregate – little weight. I agree with the trial court. The guilty plea was entered more than eight months after charges were filed, and no doubt reflected, at least in part, a pragmatic assessment that the evidence of guilt was overwhelming. Although Carroll's criminal history was not particularly extensive, I disagree that it should be considered *mitigating* in the first place, let alone significantly so. *See Frey v. State*, 841 N.E.2d 231 (Ind. Ct. Appl. 2006); *see also Settles v. State*, 791 N.E. 2d 812 (Ind. Ct. App. 2003) (holding that even a complete lack of criminal history is not necessarily entitled to significant weight).

Finally, I do not view Carroll's age as a significant mitigating factor. Carroll was twenty when he murdered Pruett. That is well past the age our courts have afforded special consideration. *See, e.g., Corcoran v. State*, 774 N.E.2d 495, 500 (Ind. 2002) (holding that twenty-two-year-old defendant was “well past the age of sixteen where the law requires special treatment”); *see also Ketcham v. State*, 780 N.E.2d 1171 (Ind. Ct. App. 2003) (the failure to give mitigating weight to a twenty-year-old defendant's age at the time of the crime was not error). By then, he was not a naïve child or immature teenager, but an adult able to take responsibility for his actions. His age does not require special mitigating weight, and the trial court did not abuse its discretion in failing to consider his age as a significant mitigating factor.

Against these two insignificant mitigators the trial court found five aggravating circumstances. Of those, I find three to be of significant weight, i.e., premeditation, lack

of remorse, and the nature and circumstances of the crime. I cannot agree with the majority's assessment that there is "no evidence beyond a reasonable doubt in the record to support premeditation as an aggravating factor." *Slip op.* at 10. After Carroll and J.M. argued on the morning of the murder, she left. Carroll purposefully drove to Pruett's house and circled the block several times before pulling in Pruett's driveway and walking up to his house. When Pruett refused his demand to come outside, Carroll returned to his vehicle and retrieved the loaded shotgun he had brought with him. These facts require no speculation as to why Carroll drove to Pruett's house and circled the block; plainly, he was angry and sought a confrontation with Pruett. The presence of premeditation could not be clearer.

As to the nature and circumstances of the crime, by all counts, Carroll calmly armed himself with a loaded shotgun, walked into Pruett's home and emptied his shotgun into his unarmed and defenseless victim from virtually point-blank range. He then walked away and as he passed Pruett's frantic mother rushing into the house, in a matter-of-fact manner he informed her that he had just shot her son. When police arrived moments later, Carroll was placed in a police cruiser. While seated inside, he yelled out to them asking if Pruett was alive or dead. He then added, "I hope he's f'ing dead." *Transcript* at 167. These facts support the trial court's conclusion that the facts and circumstances of the crime constituted an aggravating circumstance, and one that in my opinion is entitled to medium to high weight.

Thus, I agree with the trial court that the aggravating circumstances outweigh the mitigating circumstances, and that the maximum sixty-five-year sentence is appropriate. I would affirm the trial court in all respects.